CRIMINAL REFERENCE.

1886
August 19.

Before Mr. Justice Prinsep and Mr. Justice Ghose.

UMER ALI (COMPLAINANT) *v.* SAFER ALI AND ANOTHER (ACCUSED.)*

Criminal Procedure Code, ss. 191, 202, 203—*Complaint—Magistrate, Power of—"May take Cognizance of", Meaning of.*

The use of the term "may take cognizance of any offence" in s. 191 of the Criminal Procedure Code does not make it optional with a Magistrate to hear a complainant, but refers rather to the action of the Magistrate in taking cognizance of an offence in either of the specified courses in which the facts constituting the offence may be brought to his notice. He is bound to examine the complainant and then can either issue summons to the accused or order an enquiry under s. 202, or dismiss the complaint under s. 203.

THE material portion of the reference to the High Court in this case was as follows :—

"On the 2nd June the complainant presented a complaint against Safer Ali and another, charging them with offences under ss. 323 and 352 of the Penal Code before the Joint Magistrate of Chittagong, Mr. S. J. Douglas. That Magistrate recorded an order to the following effect : "I decline to take cognizance of this frivolous matter. Complainant seems to have freely abused the man who cuffed him." Against this order an application was made by the complainant before the late Officiating Sessions Judge, Mr. R. H. Greaves, who called upon the Joint Magistrate to inform him whether complainant had been examined before his complaint was dismissed. The Joint Magistrate in his reply informed him that the complaint had not been dismissed at all, but that under s. 191 of the Criminal Procedure Code he had declined to take cognizance of the offences stated in the complaint, that section by the use of the words "may take cognizance of an offence upon receiving a complaint of facts which constitute such offence" authorizing a Magistrate to use his discretion in so taking cognizance. With this view of the law the late Officiating Sessions Judge disagreed, and a further explanation was called for

* Criminal Reference No. 154 of 1886, made by F. H. Harding, Esq., Sessions Judge of Chittagong, dated the 22nd of July 1886, against the order passed by S. J. Douglas, Esq., Joint Magistrate of Chittagong, dated the 2nd of June 1886.

from the Joint Magistrate : that explanation has since been received. The opinion of the late Officiating Sessions Judge was that the matter should be referred to the High Court, and as I am of the same opinion as he was I am adopting this course.

" It appears to me that s. 191 of the Criminal Procedure Code does not contemplate such a procedure as that which has been adopted by the Joint Magistrate. It specifies the circumstances in the existence of any one of which a Magistrate may take cognizance of an offence, and in the absence of which he is precluded from taking such cognizance. The words " take cognizance" are not defined in the Criminal Procedure Code. In the present instance the petition was received by the subordinates of the Joint Magistrate's Court, and the stamp was punched. It appears to me that, having gone so far, the Joint Magistrate was bound to record the examination of the complainant under s. 200, after which he could have dealt with the case under ss. 202 and 203 if he thought proper.

" The matter is one with which I am not able to deal under s. 437, for the complaint has not been dismissed under s. 203. That s. 191 was not intended to confer upon Magistrates the power of dealing with complaints in the manner adopted by the Joint Magistrate is, I think, apparent from the fact that, whilst s. 437 gives the Court of Session power to order an enquiry into a complaint which has been dismissed under s. 203, it gives it no such power with regard to cases of which the Magistrate has refused to take cognizance. That this is an omission is very improbable, for this asserted power of refusing to take cognizance under s. 191 is even more likely to be abused than that of dismissal given under s. 203.

" The matter is one of considerable importance, and I think it desirable on this account to have an authoritative decision on the point."

No one appeared for either party on the reference.

The opinion of the Court—(PRINSEP and GHOSE, JJ.) was as follows :—

The Joint Magistrate has taken an erroneous view of the law regarding proceedings to be taken on receipt of a complaint made under s. 191 of the Code of Criminal Procedure. He is not competent

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to refuse to take cognizance of an offence on receipt of a complaint of facts constituting an offence, but he is rather bound to examine the complainant. He can then proceed to issue summons on the accused or to order an enquiry under s. 202, or to dismiss the complaint under s. 203. The use of the term "may take cognizance of any offence" does not make it optional with a Magistrate to hear the complainant. It refers rather to the action of a Magistrate in taking cognizance of an offence in either of these specified courses in which the facts, constituting an offence, may be brought to his notice. The case must be tried.

J. V. W.

APPELLATE CIVIL.

Before Sir W. Comer Petheram, Knight, Chief Justice, and Mr. Justice Ghose.

1886
July 29.

KEDAR NATH COONDOO CHOWDHRY (DEFENDANT No. 1) *v.* HEMANGINI DASSI (PLAINTIFF).*

Hindu law—Maintenance—Maintenance of mother on partition between her son and step-sons.

A widowed mother on a partition taking place between her son and her step-sons, of the property left by her husband, is not entitled to have the whole property charged with her maintenance, but only that portion of it which is allotted to her son on the partition.

A separation in food and worship took place between a Hindu widow, her son and her two stepsons, after which the widow lived as a member of her son's family, and was maintained by him. A partition of the moveable property having been made, a suit was brought by the son against the step-sons for partition of the immoveable property, and a decree was made defining the shares of the parties therein. That suit was brought and decreed pending a suit by the widow against her son and stepsons for maintenance from the date of the separation, and for fixing her future maintenance, in which suit she sought to have the maintenance charged on the whole estate left by her husband. *Held* that, from the separation to the decree in the partition suit, the widow was entitled to maintenance charged on the whole estate; and subsequently to the decree to a charge on her son's share only. But inasmuch as she had during the former period, been maintained by her son, and could not claim maintenance over again from her stepsons, whatever

* Appeals from Original Decrees No. 396 and 414 of 1885, against the decree of Baboo Bhuban Chunder Mookerji, Rai Bahadoor, Subordinate Judge of Hooghly, dated the 30th of March 1885.